

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CHAOTIC MOON, LLC

Index No.

Plaintiff(s),

*Summons**-against-*

QWIKI, INC.

Date Index No. Purchased:

Defendant(s).

To the above named Defendant(s)

QWIKI, INC.
113 Spring St., #3
New York, NY 10012

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service (or within 30 days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

The basis of venue is Defendant's residence
which is 113 Spring St., #3, New York, NY

Dated: New York, NY

January 18, 2013

PILLSBURY WINTHROP SHAW PITTMAN
LLP

by



Sean F. Kane, Peter Ostrovski

Attorneys for Plaintiff

Chaotic Moon, LLC

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

CHAOTIC MOON, LLC,

Plaintiff,

v.

QWIKI, INC.,

Defendant.

Docket No. _____

COMPLAINT

Jury Trial Requested

Plaintiff, Chaotic Moon LLC (f/k/a Chaotic Moon, L.P., “Chaotic Moon” or “Plaintiff”),
by their attorneys, Pillsbury Winthrop Shaw Pittman LLP, for its complaint against Qwiki, Inc.
(“Qwiki” or “Defendant”), alleges as follows:

NATURE OF THE CASE

1. This case concerns a violation of a straightforward agreement. After signing a contract with Plaintiff to work together in developing a phone application, Defendant breached its duties under the agreement by failing to cooperate with Plaintiff and failing to make payments for milestones as each one was met. As a result, Plaintiff did not receive compensation for its work on the project.

THE PARTIES AND RELATED PERSONS

2. Plaintiff Chaotic Moon is a Delaware limited liability company with its principal place of business in Austin, Texas. It is the world’s most proven mobile application studio and provides everything from initial brainstorming and strategy, to custom development and publishing, to managing an entire mobile presence in any application marketplace.

3. Defendant Qwiki is a Delaware corporation with its principal place of business in New York, New York. It is a mobile platform that allows users to create multimedia presentations out of a collection of information.

JURISDICTION AND VENUE

4. The Court may exercise personal jurisdiction over Defendant under CPLR § 302 because Defendant is headquartered in New York, regularly transacts business in New York, and derives substantial revenue from goods or services provided in New York.

5. Venue is proper in this Court because Defendant's actions originated in New York, New York, where Defendant conducts business.

FACTUAL ALLEGATIONS

The Parties' Agreement and First Milestone

6. Qwiki hired Chaotic Moon to assist the company in building an application (or "app") for the iPhone.

7. In connection with this engagement, the parties signed a Master Services Agreement, effective August 2012 (the "MSA"). The MSA incorporated as Exhibit A an Engagement Order and Statement of Work #1 ("SOW"), which set out the fee and payment terms between the parties.

8. Under the SOW, Chaotic Moon did not agree to take full responsibility for the product but instead agreed to "take on a full *partnership* role ... working with the Qwiki engineering and executive team" [emphasis added]. Chaotic Moon further agreed to "apply all the necessary resources in an *attempt* to ship the application no later than October 12th 2012" [emphasis added].

9. Qwiki had an obligation to pay Chaotic Moon \$60,000 upon completion of the first milestone, execution of the SOW. Qwiki made this payment to Chaotic Moon.

10. The SOW further set out a structure of payment upon the completion of several additional milestones and acceptances of associated Deliverables, defined in Section 1 of the MSA as "any deliverables to be provided by Chaotic Moon (together with all underlying

materials, notes, interim versions, object code, source code and other similar source materials, documentation, specifications, media, and other work product produced in connection with providing Services” under the MSA.

Second Milestone

11. The SOW stated that Qwiki had an obligation to pay Chaotic Moon another \$60,000 by September 1, 2012, subject to completion of the “Wires and Creative” milestone.

12. Under the SOW, Chaotic Moon was to “provide the wireframes and creative based off the direction that Qwiki and their design partner had provided to date.”

13. Qwiki failed to provide the direction called for by the SOW or the complete specifications for the application programming interface (“API”) in time to meet the target delivery date of September 1, 2012.

14. There was a mutual understanding between the parties that the delivery dates were “slipping,” and given the “partnership” nature of the project, Chaotic Moon could not have unilaterally completed the milestone.

15. Despite these obstacles, Chaotic Moon still completed the “Wires and Creative” milestone by September 9, 2012. Owen Bossola, the director of engineering for Qwiki (“Bossola”), sent an email to Chaotic Moon on the same date noting, “We are approving these wireframes.” Bossola further noted in the same email, “Great to be moving on, *officially*” [emphasis added].

16. Qwiki accepted this first Deliverable, and Chaotic Moon continued to expend resources in further performance of the MSA. On October 1, 2012, Bossola sent an email to Chaotic Moon after receiving the “final developer doc [meaning developer deck]” in which he stated, “Overall things look solid and great”

17. Chaotic Moon sent Qwiki an invoice on September 10, 2012 for payment of the

\$60,000 due upon completion of the second milestone ("Unpaid Invoice #1").

18. Qwiki has failed to pay the \$60,000 due upon completion of the second milestone.

Failure to Cooperate

19. In reliance on Qwiki's continuation of the projection and the acceptances and encouragement described above, Chaotic Moon continued development efforts on the app.

20. Under Section 4(c) of the MSA, entitled "Client Cooperation," Qwiki agreed to "reasonably and diligently cooperate with Chaotic Moon's performance of Services ... [and] ... to take any and all actions reasonably necessary to enable Chaotic Moon to perform the Services contemplated herein in an effective and efficient manner."

21. Qwiki in fact failed to provide detailed design specifications, leading to a lack of product definition, which was subject to changes at Qwiki's discretion. This hampered Chaotic Moon's ability to perform services under the MSA in an effective and efficient manner and led to the need for numerous and frequent modifications.

22. Qwiki further failed to provide Chaotic Moon engineers the necessary API until on or about November 16, 2012.

23. The communications between Qwiki and Chaotic Moon became increasingly combative and unproductive during this time, further limiting Chaotic Moon's ability to carry out its services under the MSA efficiently and effectively.

Third and Fourth Milestones

24. The SOW stated that Qwiki had an obligation to pay Chaotic Moon \$45,000 by September 14, 2012, subject to completion of the "Alpha" milestone. Additionally, Qwiki had an obligation to pay Chaotic Moon \$40,000 by September 28, 2012, subject to completion of the "Beta" milestone.

25. Despite the problems created by Qwiki's failure to cooperate, Chaotic Moon still

completed the “Alpha” and “Beta” milestones by November 2012, at which time it delivered the “Beta” version of the app to Qwiki, which accepted delivery.

26. Upon information and belief, Qwiki shipped this “Beta” version of the app to third party beta testers as Qwiki 1.0 (13), as well as subsequent “builds” of the “Beta” version of the app, including up to at least build #29.

27. On December 4, 2012, Bossola sent an email to Chaotic Moon in which he indicated, “I want the [Qwiki] team and Beta testers to use [Beta version] #29 a bit longer ... [and] ... we can do a larger build tomorrow.” Upon information and belief, this “larger build” would be the completed product or at least a “final candidate” for submission to Apple for approval for its iPhone App Store.

28. Thus, Qwiki continued to utilize the “Beta” version of the app provided by Chaotic Moon, and Qwiki urged Chaotic Moon to continue to expend extensive resources in connection with the continuing development efforts, even though Qwiki’s vision for the product was continuing to evolve, all of which was of great benefit to Qwiki and great expense (and frustration) to Chaotic Moon.

29. Chaotic Moon sent Qwiki an invoice on September 30, 2012 for payment of the \$85,000 due upon completion of the third and fourth milestones (“Unpaid Invoice #2”).

30. Qwiki has failed to pay the \$85,000 due upon completion of the third and fourth milestones.

Final Milestone

31. The SOW stated that Qwiki had an obligation to pay Chaotic Moon \$20,000 by October 12, 2012, subject to completion of the “Completion Date” milestone.

32. On December 10, Bossola sent a message to a large group of Chaotic Moon staff who were spending long hours on the project. Bossola stated, “We’re getting very close to rounding

out the first version of our application.” This “first version” was to have been a “final candidate” for submission to Apple as the complete and ready to be publicly released version of the app.

33. In the same December 10 message, Bossola outlined a number of tasks that Chaotic Moon worked on diligently, including some relating to design aspects not previously anticipated or included in the SOW, such as items changed by Qwiki and not disclosed to Chaotic Moon, or those made pursuant to requests to change or expand the scope of the SOW.

34. On December 11, 2012, Chaotic Moon made calls to Qwiki to inquire about the payment of the Unpaid Invoices. Qwiki did not respond to these calls.

35. During this time, Chaotic Moon had sent personnel to New York to work directly with Qwiki on the project.

36. On December 12, 2012, Doug Imbruce, the CEO of Qwiki (“Imbruce”), sent an email to Chaotic Moon admitting, “Your time [at Qwiki’s] office, of course, resulted in step function improvement in the app’s feature set and stability ... [and] ... we realized that we need to make compromises [from Qwiki’s previously undefined objectives] to ship the first version of this app.”

37. After expressing that “we expect [Chaotic Moon’s] team to work over the weekend,” Imbruce stated in the same December 12 email, “Let’s hope we can apply an extraordinary amount of focus and collaboration this week to get to 1.0 ASAP.” Upon information and belief, the term “1.0” referred to the complete and ready to be publicly released version of the app.

38. Chaotic Moon sent Qwiki an invoice on September 30, 2012 for payment of the \$20,000 due upon completion of the final milestone (“Unpaid Invoice #3”). Chaotic Moon also sent Qwiki an invoice on the same date for payment of \$3,131.27 due under the SOW for Reimbursable Travel Expenses (“Unpaid Invoice #4).

39. Nonetheless, Qwiki has failed to pay the \$20,000 due upon completion of the final milestone or the \$3,131.27 due for Reimbursable Travel Expenses.

40. On or about December 12, 2012, shortly after Chaotic Moon sent an email inquiring about the unpaid invoices, and without any response or explanation, Qwiki took steps that prevented Chaotic Moon's staff from accessing the computer code under development, which was stored in a code repository under the sole and exclusive control of Qwiki, again in violation of Section 4(c) of the MSA, entitled "Client Cooperation," as discussed above.

41. At this time, Chaotic Moon was willing to have its staff put in a diligent effort (including working over the weekend of December 15 and 16) in an attempt to satisfy Qwiki's growing list of demands and an increasingly expanding scope of work. Chaotic Moon was further willing and capable of working with Qwiki to complete the final milestone.

42. Qwiki's December 12, 2012 actions therefore effectively terminated the SOW.

Payment Disputes

43. Under Section 3 of the MSA, if Qwiki "... disputes, reasonably and in good faith, any charges or portion of charges specified in an Chaotic Moon invoice (the "Disputed Charge"), [Qwiki] may withhold payment of such portion that is the Disputed Charge provided that Client gives Chaotic Moon written notice of, and the basis for, such Disputed Charge within fifteen days (15) after receiving Chaotic Moon's invoice and [Qwiki] pays timely all undisputed charges."

44. To this day, Qwiki has neither given written notice to Chaotic Moon under the terms of the MSA of any dispute nor provided a basis for any dispute, even though the MSA specifically provides for a fifteen (15) day period for submitting such a dispute, and even though the MSA further provides that even if there were a dispute, Qwiki would be obligated to pay the undisputed portion of each invoice in a timely manner. There are, therefore, no Disputed Charges under the MSA.

45. On December 12, 2012, Chaotic Moon made phone calls regarding the Unpaid Invoices and also sent a message to Qwiki inquiring about the “plans for payment” and asking for “any information that would assure the [Chaotic Moon] management team that payment will be received.” Qwiki never responded or gave any rationale for nonpayment.

46. On December 17, 2012, Qwiki sent a letter purporting to terminate the Agreement Pursuant to Section 13 of the MSA and asserting that “no further payments are due Chaotic Moon.”

47. Under Section 13 of the MSA, “[T]ermination by [Qwiki] shall be effective immediately, *subject to payment of any fees accrued* for performance of Services prior to the effective date of termination” [emphasis added]. Qwiki’s December 17 letter therefore did not relieve it of the express obligations to make payments under the MSA or SOW absent properly Disputed Charges.

48. Chaotic Moon responded on December 19, 2012 with a letter demanding payment of the Unpaid Invoices.

49. By letter sent by e-mail on December 31, 2012, for the first time, Qwiki asserted that certain “Appendixes A and B that detailed the feature set and functionality of the App” applied and that Chaotic Moon was obligated to deliver “an App of the same level of quality” as “Qwiki’s iPad App [which] was featured in Apple Rewind as one of the top reference Apps of 2011.”

50. Chaotic Moon never made any such contractual commitments under the MSA or SOW. The detailed specifications for the deliverables that were to be created through a joint effort of Chaotic Moon and Qwiki were not defined at the time of the execution of the SOW; rather, it was contemplated expressly that the parties would be “working in concert” with respect to the development of the app.

51. Chaotic Moon has since reached out to Qwiki in a good faith attempt to resolve this dispute, in the spirit of the dispute resolution provision that would have applied had there been

Disputed Charges (there are none), but has been unsuccessful.

FIRST CAUSE OF ACTION

Breach of Contract

52. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1 through 51 above as if expressly set forth herein.

53. Chaotic Moon and Qwiki formed a contractual relationship by signing the MSA and SOW.

54. Qwiki breached its duties under the contract by (i) failing to pay Chaotic Moon upon the completion of each respective milestone under the SOW; (ii) failing to "reasonably and diligently cooperate with Chaotic Moon's performance of Services ... [and] ... to take any and all actions reasonably necessary to enable Chaotic Moon to perform the Services contemplated herein in an effective and efficient manner" under Section 4(c) of the MSA; and (iii) effectively terminating the agreement by cutting off Chaotic Moon's access to shared computer code.

55. Chaotic Moon performed all duties it owed under the MSA and SOW until it was prevented from doing so by Qwiki's breach.

SECOND CAUSE OF ACTION

Unjust Enrichment

56. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1 through 55 above as if expressly set forth herein.

57. Qwiki benefitted from the enormous amount of work performed by Chaotic Moon and the Deliverables resulting from that work product.

58. Chaotic Moon received no compensation for its work beyond an initial payment.

59. Equity and good conscience require restitution to Chaotic Moon of the value of its services.

THIRD CAUSE OF ACTION
Account Stated

60. Plaintiff incorporates by reference each of the allegations set forth in paragraphs 1 through 59 above as if expressly set forth herein.

61. On September 10 and September 30, an account was stated in writing by and between Chaotic Moon and Qwiki as a result of the fact that an account was made by Chaotic Moon to Qwiki for the sum of \$168,131.27, for milestones achieved under the MSA and Deliverables provided to Qwiki by Chaotic Moon.

62. A reasonable time has passed since such account was rendered without objection thereto by Qwiki.

63. The total amount owing to Chaotic Moon on Qwiki's account is \$168,131.27.

64. Although Qwiki has demanded payment in full on said account stated, there is now due, owing and unpaid from Defendants to Tony, the total sum of \$168,131.27, together with interest as allowed by law and pursuant to Section 3 of the MSA, which expressly states "Invoices not paid within thirty (30) days from the invoice date will bear interest from the due date until paid at a rate of one and one-half percent (1.5%) per month or the maximum rate permitted by applicable law...."

WHEREFORE, Plaintiff respectfully requests a judgment against Defendant Qwiki and an order:

- (i) awarding damages in favor of Chaotic Moon against Defendant for all damages sustained as a result of Defendant's breaches in an amount to be determined at trial, but in no event less than \$168,131.27, plus prejudgment interest thereon;
- (ii) awarding Chaotic Moon its reasonable costs and expenses incurred in this action, including reasonable attorneys' fees and expert fees; and
- (iii) granting such other and further relief as the Court may deem just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Dated: New York, NY
January 18, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'S. Kane', written over a horizontal line.

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